

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-6566-99

JJSweeney

date:

to: Chief Examination Division, Manhattan District
Attn: Steven Steinberg, Program Manager, Financial Services and
Healthcare (Lmsb), Team 1153

from: District Counsel, Manhattan District, New York

subject: Taxpayer: [REDACTED] (UIL: 6501.08-10)
EIN: [REDACTED]
Taxable Years: Fiscal Years Ended January 31, [REDACTED] and
[REDACTED] (Form 1120 Income tax Returns)

PROPER LANGUAGE FOR A FORM 872 FOLLOWING CORPORATE NAME CHANGE

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This memorandum responds to your request for written advice concerning the appropriate language for a Form 872, Consent to Extend the Statute of Limitations on Assessment, ("Form 872") in connection with the corporate income tax returns (Forms 1120) of [REDACTED] ("[REDACTED]") for the taxable years ended January 31, [REDACTED] and [REDACTED]¹. This request was made in light of

¹You also submitted to our office a Form 872 covering [REDACTED]'s potential liability for withholding taxes under I.R.C. § 1441-1446 for its December 31, [REDACTED] through December 31, [REDACTED] taxable years. As previously discussed, those Forms were unnecessary as you indicated that [REDACTED] had not filed any

██████'s ██████ change in name to ██████.

In brief, we conclude the Form 872 to be issued should be addressed as follows: "██████ (██████), formerly known as ██████ (██████)".

Facts

██████ was incorporated under the laws of New York State. For the years relevant to this advice, it filed a Form 1120 federal income tax return for its January 31, ██████ taxable year and another Form 1120 for its short taxable year ended ██████. It did not file these returns as part of any consolidated group. Sometime after those taxable years, ██████ was acquired by ██████ ("██████"). ██████ then filed its federal income tax returns as part of a consolidated group of which ██████ was the parent.

The Examination Division ("Examination") of the Manhattan District is currently examining the Form 1120 returns of ██████ for the January 31, ██████ and ██████ taxable years. To extend the statute of limitations for assessment for those years, on ██████ Examination had obtained a Form 872 executed by ██████. This Form 872 indicates that the assessment period for these tax years expires on ██████². Examination will now seek an additional Form 872 to further extend the statute of limitations on assessment for these years under I.R.C. § 6501(c)(4).

On ██████, ██████ had filed with the State of New York Department of State a Certificate of Amendment to its Certificate of Incorporation ("the amendment"). In the amendment, ██████ changed its name to ██████. ██████ has provided Examination with a copy of the amendment. The amendment copy is stamped as received by the State of New York Department of State³.

withholding tax returns for U.S. source income of foreign persons (Forms 1042) for those years. See, I.R.C. § 6501(b)(3) (returns executed by Service do not start the running of the period of limitations on assessment).

²Our office was not requested to render an opinion concerning the language included on this previously executed Form 872.

³Under New York State Business Corporation law § 801 (McKinney 2000), a New York Corporation may amend its certificate of incorporation to, among other things, reflect a change in its

The facts presented do not indicate that [REDACTED] has participated in any merger or consolidation since [REDACTED] within the meaning of New York Business Corporation Law § 901(a)(1) and (2) (McKinney 2000).

Law and Analysis

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

AS [REDACTED] has changed its name to [REDACTED] (" [REDACTED] "), the language for a Form 872 should reflect this name change. If this name change has any impact on [REDACTED]'s liability for debts contracted and/or incurred by [REDACTED] before its name change, that consequence should also be considered in drafting the Form 872.

Relevant state law should determine whether a corporation in its new name is responsible for liabilities incurred before its change in name. Gator Oil Company v. Commissioner, 66 T.C. 145 (1976). In Gator Oil, the petitioner, a Florida corporation, changed its name by amending its by-laws and by filing these amended by-laws with the State of Florida. This amendment was properly conducted pursuant to Florida corporation law. The Court determined that, under Florida case law, the petitioner's identity remained unchanged despite its change in name. The Court therefore concluded that the petitioner's name change had no effect on its continuing liability for debts incurred before its change in name.

name. To accomplish this amendment, a certificate of amendment must be filed with the department of state. N.Y.B.C.L. § 805 (McKinney 2000).

In this case, as [REDACTED] was a New York Corporation, New York law should determine whether [REDACTED]'s name change affects its responsibility for liabilities incurred before its name change. New York law follows principles similar to those referenced under Florida law in Gator Oil. It has been held that when a corporation changes its name pursuant to New York Business Corporation law § 801, it remains the same legal entity that existed before the name change. Department of Justice v. Carls, 578 F.2d 295 (C.C.P.A. 1978). As the same legal entity, a New York corporation's property, rights and obligations remained unchanged after changing its name. Walsh v. Fidelity and Deposit Company of Maryland, 227 N.Y.S. 96 (1928).

In this case, [REDACTED] ostensibly took the proper steps under New York Business Corporation Law § 805 to effect its change in name to [REDACTED]. Under the above-cited New York case law, [REDACTED] remains liable for the debts incurred by [REDACTED] in that name. Thus, the Form 872 should be addressed to [REDACTED]⁴. Although [REDACTED] would be a successor in interest to [REDACTED] had any merger or consolidation occurred in connection with the name change, the facts fail to indicate that any such events occurred.

As a result, this change in name should be reflected in the "name" section of the Form 872 as follows: "[REDACTED] ([REDACTED]), formerly known as "[REDACTED] ([REDACTED])."

Three final points are noted relative to this advice.

(b)(5)(AWP), (b)(7)a

[REDACTED]

(b)(5)(AWP), (b)(7)a [REDACTED]. Second, the current representative has indicated that [REDACTED] no longer owns any assets. Although transferee liability of another entity under I.R.C. § 6901 might therefore be considered, you previously determined that no such issue was present. Accordingly, we express no opinion on the merits of pursuing this issue.

Third, Section 3461 of the Restructuring and Reform Act of

⁴The consolidated return regulations nowhere indicate that a stand alone corporation cannot execute its own 872 if in a later tax year it becomes a member of a consolidated group. See, Treas. Reg. § 1.1502-77. Accordingly, although [REDACTED] joined [REDACTED]'s consolidated group following the years at issue here, [REDACTED] (rather than its parent company [REDACTED]) should execute this Form 872.

1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document these actions in the case file.

As no further action is required of our office at this time, we are closing our files for this case. If you have any questions concerning the advice provided in this memorandum, please contact John Sweeney at (212) 264-1595, ext. 263.

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